85-1612

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO,

APPELLANT,

VS.

PATIRCK MURPHY,
ALASKA PUBLIC EMPLOYEES ASSN.,
STATE OF ALASKA,

APPELLEES.

APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

DANIEL R. DE NARDO
P.O. BOX 100682
ANCHORAGE, ALASKA
99510

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

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P.O. BOX 100682
ANCHORAGE, ALASKA
99510

QUESTION PRESENTED

Whether the uniform period of limitation applicable to Civil Rights Actions under Wilson v. Garcia, 105 S.Ct. 1938(1985), may be extended by the state one year savings statute?

PARTIES

1. Daniel R. DeNardo
2. Patrick Murphy
3. Alaska Public Employees Association
4. State of Alaska

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09.10.240. Commencement of action after reversal or dismissal. 3,4

OPINIONS BELOW

Mr. DeNardo filed a Civil Rights Action in the Federal District Court of Alaska.

The district court issued its memorandum and judgment on 21 May,1984. [Appendix B]

Appeal was filed in the Ninth Circuit. The Ninth Circuit issued its opinion on 30 January, 1986 affirming the district court. [Appendix A]

The petition for rehearing was denied without opinion on 12 March, 1986. [Appendix C]

JURISDICTION

The state savings statute was challenged as depriving Mr. DeNardo of his cause of action under 42 U.S.C.§1983.

The jurisdiction of the United States Supreme Court is invoked under 29 U.S.C. §1257(2); or in the alternative, 28 U.S.C. §1254.

STATUTES

Alaska Statute 09.10.240. Commencement of action after dismissal or reversal.

If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or, if the plaintiff dies and the cause of acton in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision. (§ 1.24 ch 101 SLA 1962)

STATEMENT OF THE CASE

CHRONOLOGICAL HISTORY

Civil Rights Action Filed in State Court	10 April,1980
Dismissed-Failure to Exhaust Administrative Remedies	8 Oct., 1980
Mandate of State Supreme Court Affirming Dismissal	28 Aug., 1981
Identical Civil Rights Action Refiled In Federal Court: Within (1) Year Savings Statute	17 June, 1982

The Ninth Circuit ruled on one issue: The application of the state savings statute under 42 U.S.C. §1988. [Appendix A-2] The Court determined that the limitation period was not extended by the Alaska savings statute, 09.10.240.

NINTH CIRCUIT INCORRECTLY PARAPHRASED THE STATE SAVINGS STATUTE

The Ninth Circuit incorrectly paraphrased

the state savings statute by deleting two critical phrases. The deletions caused the Court to deny the application of the savings statute to Mr. DeNardo's Civil Rights Action.

Ninth Circuit Paraphrase
[Appendix A-8, n.4]

"The statute's one-year limit begins to run however,. . .

9th Circuit - "upon dismissal by the trial court" . . .

Statute - **"dismissal upon the trial or upon appeal"**. . .

9th Circuit - "or reversal on appeal"

Statute - **"after the dismissal or reversal on appeal."**

The Ninth Circuit calculated the limitation tolling date from 18 June, 1982; the date the Civil Rights Action was filed in the federal district court.

The correct date was 10 April, 1980;

the date the action was filed in the state court to toll the limitation statute under the savings statute.

Mr. DeNardo had one year from 28 August, 1981 to refile his action: That was the date the state supreme court issued its mandate affirming the "dismissal on appeal." [Appendix E] Mr. DeNardo refiled the action in the federal district court on 17 June, 1982. [Appendix A-3]

Background

Mr. DeNardo was a permanent state employee. [R.5;K,N-1&2] He filed a Civil Rights Action in the state superior court within the two year personal injury statute.

Mr. DeNardo did not appeal an adverse administrative decision. [Appendix A-2]

The state court granted the defendants' motion to dismiss because Mr. DeNardo

did not exhaust the administrative remedies.

[R.5,S-2]

> The Alaska Superior Court granted summary judgment against DeNardo on 2 September, 1980 for failing to appeal the Alaska Labor Board's decision and thereby **failing to exhaust his administrative remedies.**

[Appendix B-2]

The Alaska Supreme Court affirmed the dismissal. [Appendix E]

THE FEDERAL QUESTION IS SUBSTANTIAL

What happens if the state courts with concurrent jurisdiction under 42 U.S.C. §1983 dismiss a Civil Rights Action because the state courts refuse to follow the policy declared in Patsy v. Board of Regents of the State of Florida, 457 U.S. 496(1982)?

National uniformity demands that a Plaintiff under the Civil Rights Act must have access to the federal courts if the state courts refuse to hear his case.

The intent of Congress under 42 U.S.C. §1983 was to provide relief from Constitutional deprivations under color of state law, "[w]hether that action be executive, ligislative or judicial." Mitchum v. Foster, 407 U.S. 225,242(1972).

Adoption of a uniform savings statute guarantees access to the federal courts

when the state courts refuse their concurrent jurisdiction under 42 U.S.C. §1983.

Burnett v. New York Central Railroad, 380 U.S. 424(1965), instituted a uniform savings statute for federal causes of action under the Federal Employers' Liability Act(FELA).

An FELA action timely filed in state court tolls the limitation statute. The action can be refiled in federal court within one year after the mandate of the state supreme court affirms the "dismissal on appeal." id. 435.

The state savings statute is incorporated in the uniform limitations statute adopted under 42 U.S.C. §1988.

Their application is controlled by federal policy. Wilson v. Garcia, 105 S.Ct. 1938,1943,n.17(1985).

Extending the uniform limitation statute one year under a uniform savings statute would further Congressional policy under 42 U.S.C. §1983.

Congressional policy is that failure to exhaust administrative remedies does not bar a Civil Rights Action. Patsy, supra; Elliott v. University of Tennessee, 766 F.2d 982(6th Cir. 1985), cert. granted 54 USLW 3374.

Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitation is served in doing so.

The Ninth Circuit has not applied the savings statute consistent with federal policy. If the state courts refuse to hear a Civil Rights Action on grounds rejected by the policy determinations of the United States Supreme Court in Patsy; then a uniform national savings statute would guarantee access to the jurisdiction of the federal courts.

> "[i]t is useful to recall that §1983 provides a uniquely federal remedy against incurssions under the claimed authority of state law upon rights secured by the Constitution and law of the Nation."

Wilson v. Garcia, 105 S.Ct. at 1945.

CONCLUSION: The incorporation of variant state saving statutes defeats the aim of the federal limitation provision designed to produce national

uniformity under Wilson v. Garcia. The period "saved" under such statutes varies widely among the States, and some States do not have "saving" statutes.

To accept the Ninth Circuit's argument that the limitation is not tolled under the circumstances presented here would do violence to the policies underlying Wilson v. Garcia. A plaintiff who brings a timely Civil Rights Action in federal court would not be barred for failure to exhaust administrative remedies. A similar plaintiff in a state court could be barred by the running of the limitation period. Yet Congress, in providing for concurrent state and federal court jurisdiction sought to protect the plaintiff's right to bring a Civil Rights Action in state court.

A uniform rule tolling the limitation statute for the period of the pendency

of the state court action and until the state court dismissal order becomes final is fair to both plaintiff and defendant, carries out the purpose of the Civil Rights Act, and best serves the policies of uniformity and certainty underlying the federal limitation provision.

Appeal or certiorari should be granted.

RESPECTFULLY SUBMITTED 28 March,1986.

Daniel R. DeNardo
Daniel R. DeNardo

UNITED STAES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

PLAINTIFF-APPELLANT,

VS.

PATRICK MURPHY, ALASKA PUBLIC EMPLOYEES ASSN., STATE OF ALASKA,

DEFENDANTS-APPELLEES.

FILED 30 JAN. 1986

NOS. 85-3745
85-3773

OPINION

Appeal from the United States District Court for the District of Alaska
District Judge James M. Fitzgerald

[Argued and Submitted Nov. 6, 1985- Seattle]

Before: WRIGHT AND REINHARDT, Circuit Judges, and STRAND, District Judge.

WRIGHT, Circuit Judge.

DeNardo brought this pro se Civil Rights Action four years after being fired from his job with the State of Alaska and after judgment against him on an an identical complaint entered in state court. After filing this federal action but before judgment, DeNardo brought a

BEST AVAILABLE COPY

third action, returning again to state court.

The district court granted summary judgment for the defendants on res judicata grounds. We do not reach the res judicata question, but we affirm the court's judgment because the statute of limitation has run. We also hold that the district court did not abuse its discretion in issuing an injunction barring DeNardo from relitigating his claim.

BACKGROUND

In April, 1978, DeNardo was discharged by the state for not paying union dues. He filed unfair labor charges with the Alaska Labor Relations Agency, which rendered a decision against him. He did not appeal that decision.

More than a year later, he brought suit in Alaska Superior Court against Patrick Murphy, the Alaska Public Employees Assn., and the State of Alaska.

In September 1980, the state court granted the defendants' summary judgment motion, Both the Alaska and United States Supreme Courts denied review.

In June 1982, over four years after his discharge, DeNardo brought this action in federal district court. The complaint and the defendants were the same as those before the superior court.

In April 1984, before the district court had rendered a decision, DeNardo brought a third claim, based on his discharge, against the same three defendants. That action was filed in Alaska Superior Court.

The district court granted final judgment against DeNardo on his federal claims, permanently enjoining him from commencing, without the court's permission, any lawsuit connected with his discharge.

DeNardo filed two timely appeals from the district court's judgment. They were consolidated and are not before us.

ANALYSIS

Because all of the issues here are legal, we review the district court's summary judgment de novo. In re Airport Car Rental Antitrust Litigation, 766 F.2d 1292,1294(9th Cir. 1985). We may affirm on any basis in the record. Hatch v. Reliance Ins., 758 F.2d 409-414(9th Cir., cert. den. 106 U.S. 571(1985).

Summary judgments granting permanent injunctions are reviewed for abuse of discretion and for application of erroneous legal principles. S.E.C. v.

Goldfield Deep Mines , 758 F.2d 459,465(9 th Cir. 1985).

II. Statute of limitation

The Superme Court held recently that a state's statute of limitation for personal injury actions applies to civil rights actions under 42 U.S.C. §1983. Wilson v. Garcia, 105 S.Ct. 1938,1949 (1985). Under Alaska's personal injury statute of limitation, DeNardo would have had two years in which to file his complaint. Alaska Stat. §9.10.070;[1/] Blake v. Gilbert, 702 F.2d 631,639(Alaska 1985). Since Wilson was decided after DeNardo filed this action in the district court, we would usually have to decide

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1 Section 9.10.070 provided in relevant part: No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; ...or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years.

whether to apply it retraactively. [2/] Rivera v. Green, 775 F.2d 1381,1383(9th Cir. 1985). Because the result is the same whether or not we apply Wilson wer need not reach the retroactivity question.

Prior to Wilson federal courts borrowed state statutes oflimitation in §1983 actions. Stephan v. Dowdle, 733 F.2d 642 (9th Cir. 1984). In determining which

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2 Although the Supreme Court in Wilson did not apecify whether its holding would app;y retroactively, every circuit that has considered the issue since Wilson was decided has applied the holding retroactively. Mulligan v. Harzard, 777F.2d 340,343-344(6th Cir. 1985); Wycoff v. Menke, 773 F.2d 983,986-987(8th Cir. 1985); Fitzgerald v. Larson, 769 F.2d 160, 162-164(3rd Cir. 1985); Jones v. Preuit & Mauldin, 763 F.2d 1250,1253 n.2(11th Cir. 1985).

state statute to apply to §1983 claims, courts would characterize the claims. Lai v. Honolulu, 749 F.2d 588,589(9th Cir. 1984). Since Smith v. Cremins, 308 F.2d 187,189(9th Cir. 1962), this circuit has characterized claims under §1983 as actions on a liability created by statute and, whereever possible, the state limitations governing actions founded on a liability created by statute hav been applied.

Thus, although no published opoinion decided which statute of limitation would have applied in a civil rights action arising in Alaska, this circuit would have applied the Alaska statute referring to actions founded on a liability created by statute, Alaska Stat. § 9.10.070,[3/] which allows litigants two years to file their complaints.

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[3] This statute is the one wer would apply under Wilson and is quoted in footnote1,supra.

The statute of limitation that applies to DeNardo's claim is two years whether or not we apply Wilson retroactively. Since DeNardo's claim arose from his termination in April 1978 and he did not file this action June 1982, we find that his claim is barred by the statute of limitation. 4/

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4 Unless state law requires the contrary, the pendency of DeNardo's state action did not toll the statute of limitation for his federal action. Board of Regents v. Tomanio, 446 U.S. 478,486-92(1980). DeNardo argues that the Alaska Savings statute, Alaska Stat. §9.10.240, allows him to file his federal action within one year of the Supreme Court's denial of certiorari in his first case.

If his interpretation were correct, we would have to allow this action as timely. Wilson v. Garcia, 105 S.Ct. 1938,1943 n. 7 (1985) (length of limitation period, tolling, revival, and application are governed by state law). The statute's one-year limit begins to run, however, upon dismissal by the trial court or reversal on appeal.

We cannot accept DeNardo's interpretation of 9.10.240. To allow a litigant to refile an action a year after a denial of certiorari, especially when he has had judgment entered against him in trial court and the highest court in the forum

III. Injunction Barring Relitigation

DeNardo argues that his First Amendment rights are violated by the district court's injunction, barring him from commencing any lawsuit or toher legal proceedings against the State of Alaska, its agencies, officers, employees, or agents, on account of or with relation to the termination of his employment in 1978 with the State of Alaska without prior leave of a judge of the district court.

---

state has refused to hear his appeal, would minimize the importance of finality and allow a losing plaintiff to continue to harass a defendant even after exhauting his appeal to the highest federal court. Barrow Development v. Fulton Ins., 418 F.2d 316,319-20(9th Cir. 1969); Atlas Enterprises, v. Consolidated Construction, 572 P.2d 68,70(Alaska 1977)(assuming with out deciding tht 9.10.240 applies to dismissals without prejudice). We cannot agree that the traditional policies of repose meant little to the Alaska legislature.

We upheld such an injunction in Wood v. Santa Barbara Chamber of Commerce 705 F.2d 1515(9th Cir. 1983),cert.den. 465 U.S. 1081(1984). We said:

> The doctrines of collateral estoppel and res judicata ordinarily provide adequate assurance that one court's resolution of a controversy will be respected by other courts. Nevertheless, under the All Writs Act, 28 U.S.C. §1651, district courts do have the power to rein force the effects of these doctrines by issuing an injunction against repetitive litigation.

Id. at 1524.

REview of the injunction does not stop with an assertion of power, however. The power must not have been abused, Wood, 705 F.2d at 1524. "Access to the courts is a fundamental tenet of our judicial system." In re Oliver, 682 F.2d 443, 446(3rd Cir. 1982). In examining the district court's exercise of discretion, we must balance the benefits to defendants and the court from the reinforcement of the doctrines of collateral estoppel and

res judicata against the costs incurred by the plaintiff and the public by closing the court to potentially meritorious claims.

Although litigiousness alone is no reason to enjoin futur litigation, Ruderer v. United States, 462 F.2d 897, 899(8th Cir.), cert,den. 409 U.S. 1031 (1972), frivolous claims by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time. Harrelson v. United States, 613 F.2d 114,116(5th Cir.1980).

In view of the number of times DeNardo has forced these defendants to defend themselves on the same claim, the age of the under lying claim, and the **resolution of the same issue in both federal and state courts,** the district court did not abuse its discretion by enjoining future litigation over DeNardo's 1978 discharge.

The judgment dismissing DeNardo's claims is AFFIRMED. The order appealed from is AFFIRMED. The motion by Murphy and the Alaska Public Employees Assn. for attorneys fees is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

DANIEL R. DE NARDO,
PLAINTIFF,
V.
PATIRCK MURPHY,
ALASKA PUBLIC EMPLOYEES ASSN.,
DEFENDANTS.

FILED
21 MAY,1984

NO. 82-237

MEMORANDUM AND ORDER

These cross-motions for summary judgment areise in a wrongful termination and vicil rights action brought by Daniel R. DeNardo against the defendants. Plaintiff DeNardo was an employee of the State of Alaska in 1976-1979 and was required, under the terms of APEA's collective bragaining areeement with the State, to make regular monthly payments to the APEA. He was discharged for nonpayment of dues at the APEA's request on April 21, 1978. Alaska Labor RElations Agency Decision No. 39,pp. 2-3.

Following his termination, DeNardo

filed an unfair labor charge against the APEA and the State of Alaska with the State of Alaska Labor Relations Agency, and that agency ultimately determined that DeNardo had been terminated for just cause on January 8,1979. DeNardo did not appeal the agency's decisin, but instead brought suit in the Alaska Superior Court on April 10, 1980 for the "taking and conversion" of his Fourteenth Amendment property interest in his employment, The Alaska Superior Court granted summary judgment against DeNardo on 2 September 2, 1980 for failing to appeal the Alaska Labor Relations Agency's decision and therby failing to exhaust his administrative remedies. DeNardo appealed to the Alaska Supreme Court, which denied his appeal without decision on 18 August, 1981. DeNardo then filed an appeal and petition for certiorari to the U.S. Supreme Court which desmissed his appeal

and denied cerriorari on December 7, 1981, and denied his petition for rehearing on March 22, 1982. DeNardo then filed the present action in federal court on 17 June, 1982, using as says the "exact same Complaint" that he had used in his state court action.

The threshold issue in this action is whether the principles of res judicata bar this court from now considering DeNardo's claim on the merits, since whose claims have already been fully and dinally adjudicated before the Alaska state courts, and have been refected on application for certiroari by the U.S. Supreme Court.

Even if there should be procedural infirmaties in the Alaska Labor Board's original decision, as DeNardo claims, the Alaska state courts provided DeNardo with a full and fair opportunity to present his claims; and the deicsions of the Alaska courts must be fiven res judicata

effect. Southern Pacific Trans. Co. v. Public Utilities Commission, 716 F.2d 1285,1290(9thCir. 1983), cert.den. 52 USLW 3755-3756(1984).

Federal courts must give preclusive effect to state court judgments in civil rights actions brought under 42 U.S.C. §1983, such as the present action, as well as in other federal cases, as long as the present action, as long as the parties have had a "full and fair opportunity to litigate their claims in state court." Allen v. McCurry, 449 U.S. at 101,103-105.

Therefore, if DeNardo would now be barred from bringing his present claims in the Alaska courts, he is likewise precluded from bringing the same claims in the federal courts. Kremeer v. Chemical Construction , 456 U.S. at 466.

DeNardo's prior state action involved precisely the ssme parties, the same

underlying events, the same legal claims, the same prayer for relief, and, in fact, the same complaint as the present action. All the issues and claims raised by DeNardo in the present action tither were or could have been raised in his state court action. Moreover, DeNardo had a full and fair opportunity to present his claims and to set forth his contentions when he litigated his prior action in the state courts. Furthermore, the state court decisions granting summary judgment in DeNardo's prior action were rendered on the merits, as that termis defined in Alaska Rule of Civil Procedure 41(b). Moran v. Poland, 494 P.2d at 815-816.

In light of these authorities, I cannot conclude that the Alaska state court decisions in DeNardo's prior action are void. The Alaska courts had personal jurisdiction over all parties, including DeNardo, as well as subject matter

jurisdiction over the entire action. As the plaintiff, DeNardo had invoked and voluntarily submitted himself to the jurisdiction of the Alaska courts. Moreover, there were no indispensable parties whom DeNardo was unable to join in the action , nor are there any allegations of fraud or misrepresentation on the part of any of the defendants. Finally, I conclude that DeNardo was provided a full and fair opportunity by the Alaska courts to raise any and all challenges or contentions regarding his termination and the subsequent Labor Board hearing, including all the arguments that he wishes to raise in the present action.

DeNardo's present contention that the Alaska state court decisions in his prior action were void appears to rest on his belief that these decisions were erroneous. He argues that the Labor Board decision concerning his termination was void,

because the agency allegedly violated its own procedural requirements and because the decision was not supported by the evidence. However, he does not explain why the Alaska court decisions granting summary judgment against him based upon his failure to exhaust his administrative remedies are void, and it is those decisions to which this court must give res judicata effect. Even if the labor agency's decision should be void, as DeNardo suggests, it soes not follow that all the subsequent state court dicisions reviewing that agency decision are void as well. Southern Pacific Trans. v. Public Utilities Commission, 716 F.2d 1285,1290(9th Cir. 1983), cert.den. 52 USLW 3755-3756(April 16,1984).

Moreover, DeNardo's claim that the Alaska state courts "affirmed" the state labor agency's decision is inaccurate: the courts did not specifically affirm or

reject the labor agency's decision, but instead ruled against DeNardo based upon his failure to appeal that decision. Ultimately, DeNardo's only basis for challenging the state court decisions is his belief that they were erroneous. Upon a review of controlling authorities, I conclude that this is not sufficient.

DeNardo argues against the application of res judicata is that he filed the present action in this court within one year after the Alaska Supreme Court denied his appeal in his prior state court action, and that therefore, Alaska's one-year "savings statute," AS 9.10.240, authorized him to bring the present action. I am unable to agree. As 9.10 .240 provides that :

> If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff...may commence a new action within one year after the dismissal or reversal on appeal.

AS 9.10.240 only provides that the timely filiing of an action which is then dismissed without prejudice and is not decided on the merits tolls the applicable statute of limitations for initiating that actioin.

Barrow Development Co. v. Fulton INsuranc, 418 F.2d 316,319-320(9th Cir. 1969) Burnett v. New Yorik Central Railroad, 380 424,431-432(1965). It does not authorize relitigation of claims that have already been decided on the merits, and it does not suspend the application of res judicata principles. Since DeNardo's claims against the three defendants in this action have already been decided "on the merits" in the Alaska state courts, as that term is defined in Alaska Rule of Civil Procedure 41(b), AS 9.10.240 does not authorize DeNardo to relitigate those clsims in this or any other court.

For these reasons, I now GRANT the motions for summary judgment by defendants APEA, Murphy, and the State of Alaska against plaintiff DeNardo.

ORDERED ACCORDINGLY.

DATED at Anchorage, Alaska, this 18th day of May, 1984.

James M. Fitzgerald
United States District
Judge

C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

PLAINTIFF-APPELLANT,

VS.

PATRICK MURPHY,
ALASKA PUBLIC EMPLOYEES ASSN.,
STATE OF ALASKA,

DEFENDANTS-APPELLEES.

NOS. 85-3745 85-3773

FILED MARCH 12, 1986

ORDER DENYING PETITION FOR REHEARING

Before: WRIGHT AND REINHARDT, Circuit Judges, and STRAND, District Judge.

The Petition for Rehearing, filed on February 18, 1986, has been considered and DENIED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

PLAINTIFF-APPELLANT,

VS.

PATRICK MURPHY,
ALASKA PUBLIC EMPLOYEES ASSN.,
STATE OF ALASKA,
DEFENDANTS-APPELLEES.

NOS.
85-3745 &
85-3773

NOTICE OF APPEAL

This is notice that Daniel R. DeNardo appeals from the judgment of the Ninth Circuit entered 30 January,1986 and the denial of Rehearing entered 12 March,1986.

DATED this 24th of March,1986.

Daniel R. DeNardo

SUPREME COURT FOR THE STATE OF ALSAKA

DANIEL R. DE NARDO,

APPELLANT,

VS.

PATRICK MURPHY,
ALASKA PUBLIC EMPLOYEES ASSN.,
STATE OF ALASKA,

APPELLEES.

FILE NO.
5631

MANDATE

TO: Superior Court for the State of Alaska
Third Judicial District at Anchorage

Daniel R. DeNardo filed an appeal from a judgment of the Superior Court, Third Judicial District at Anchorage, in Civil action no. 3AN-80-2396. The case was heard by this court on JUne 23, 1981. ON July 28, 1981, the court filed its written memeorandum opinion and judgment. Petitioner's petition for rehearing was denied by this court on August 27, 1981.

IT IS ORDERED:

The Judgment of the Superior Court, entered October 8, 1980, is affirmed.

Each party will bear its own costs and attorny's fees in this appeal.

Entered by direction of the Court and pursuant to Appellate Rule 507 at Anchorage, Alaska, on August 28,1981.

SEAL CLERK OF THE SUPREME COURT

_____

Robert D. Bacon

Supreme Court, U.S.
FILED
APR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1612 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO,

APPELLANT,

VS.

PATRICK MURPHY,

ALASKA PUBLIC EMPLOYEES ASSN.,

STATE OF ALASKA,

APPELLEES.

APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

MOTION TO AFFIRM JUDGMENT

Marc W. June,
BIRCH, HORTON, BITTNER,
PESTINGER & ANDERSON
1127 W. 7th Avenue
Anchorage, AK. 99501

9PP

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"If an action is commenced within the time prescribed and is dismissed upon the appeal or upon appeal after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies and the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, or available against the action when brought under this provision."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO, Appellant, vs. PATRICK MURPHY, ALASKA PUBLIC EMPLOYEES ASSN., STATE OF ALASKA Appellees.	)	Case No. _____

MOTION TO AFFIRM JUDGMENT

COMES NOW, defendant STATE OF ALASKA and hereby moves to affirm the judgment of the Ninth Circuit Court of Appeals in this matter.

This motion is made pursuant to Rule 16.1(c), Rules of the Supreme Court of the United States, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial that there is not to be further argument.

This motion is supported by the accompanying memorandum of law.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANIEL R. DE NARDO,	)	
	)	
Appellant,.	)	
	)	
vs.	)	Case No. _____
	)	
ATRICK MURPHY, ALASKA	)	
UBLIC EMPLOYEES ASSN.,	)	
TATE OF ALASKA	)	
	)	
Appellees.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION TO AFFIRM JUDGMENT

Statement of the Case

On January 30, 1986, the Ninth Circuit ourt of Appeals for the United States held ursuant to Wilson v. Garcia, _____ U.S. _____, 05 S.Ct. 1938 (1985) that Appellant DeNardo's laim was barred by the statute of limitation. ppellant DeNardo is seeking review by this court n the grounds that the statutory limitation was olled by DeNardo's unsuccessful pursuant of a rior action against the identical defendants. An dentical action brought by Mr. DeNardo in Alaska

State Court was dismissed. This dismissal was affirmed by the Alaska Supreme Court. Petition for Certiorari was denied. DeNardo v. Murphy, 454 U.S. 1096 (1982).

Argument

Rule 16.1(c) authorizes a motion to affirm the judgment sought to be reviewed if "it is manifest that the questions on which the decisions of the court depends are so unsubstantial as not to need further argument." There can be no doubt that the question raised by Mr. DeNardo is such that the underlying judgment should be affirmed.

Mr. DeNardo seeks to have the court apply A.S. 09.10.240 so as to revive his ability to renew his 42 USC §1983 action against the State of Alaska. A.S. 09.10.240 states as follows:

> "If an action is commenced within the time prescribed and is dismissed upon the appeal or upon appeal after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies in the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, or available against the action when brought under this provision."

Mr. DeNardo claims that his action comes within the ambit of A.S. 09.10.240 due to its being filed within one year of the denial of certiorari. As the Ninth Circuit correctly pointed out, the statute's one year limitation begins to run only upon dismissal by the trial court or reversal on appeal. See Denardo v. Murphy, _____ F.2d _____, Op. No. 85-3475, 85-3773, at p.8 (January 30, 1986). This construction of A.S. 09.10.240 is consistent with Alaska law. See Barrow Development v. Fulton Insurance Company, 418 F.2d 316, 319-20 (9th Cir. 1969); Atlas Enterprises v. Consolidated Construction Co., 572 P.2d 68, 70-71 (Alaska 1977).

Since the Ninth Circuit construction of A.S. 09.10.240 is consistent with Alaska law, it is clear that Mr. DeNardo has failed to raise any sort of substantial question for review by this court. For that reason, the underlying judgment should be affirmed.

RESPECTFULLY SUBMITTED this _____ day of April, 1986 at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER & ANDERSON
Attorneys for State of Alaska

By:_____
Marc W. June